Rule 611. Mode and Order of Examining Witnesses and Presenting Evidence.

(a) Control by the Court; Purposes. The court should exercise reasonable control over the mode and order of examining witnesses and presenting evidence so as to:

(1) make those procedures effective for determining the truth;

(2) avoid wasting time; and

(3) protect witnesses from harassment or undue embarrassment.

(b) Scope of cross-examination. A witness may be cross-examined on any relevant matter.

(c) Leading Questions. Leading questions should not be used on direct examination except as necessary to develop the witness's testimony. Ordinarily, the court should allow leading questions:

(1) on cross-examination; and

(2) when a party calls a hostile witness, an adverse party, or a witness identified with an adverse party.

Comment to 2012 Amendment

This rule has been amended to conform to Federal Rule of Evidence 611, except for subsection (b), which has not been changed.

Additionally, the language of subsections (a) and (c) has been amended to conform to the federal restyling of the Evidence Rules to make them more easily understood and to make style and terminology consistent throughout the rules. These changes are intended to be stylistic only. There is no intent in the restyling to change any result in any ruling on evidence admissibility.

The 2012 amendment of Rule 611(a) is not intended to diminish a trial court's ability to impose reasonable time limits on trial proceedings, which is otherwise provided for by rules of procedure. Similarly, the 2012 amendment of Rule 611(c) is not intended to change existing practice under which a witness called on direct examination and interrogated by leading questions may be interrogated by leading questions on behalf of the adverse party as well.

Comment to Rule 611(a), 1995 Amendment

Following are suggested procedures for effective document control:

(1) The trial judge should become involved as soon as possible, and no later than the pretrial conference, in controlling the number of documents to be used at trial.

(2) For purposes of trial, only one number should be applied to a document whenever referred to.

(3) Copies of key trial exhibits should be provided to the jurors for temporary viewing or for keeping in juror notebooks.

(4) Exhibits with text should and, on order of the court, shall be highlighted to direct jurors' attention to important language. Where important to an understanding of the document, that language should be explained during the course of trial.

(5) At the close of evidence in a trial involving numerous exhibits, the trial judge shall ensure that a simple and clear retrieval system, e.g., an index, is provided to the jurors to assist them in finding exhibits during deliberations.

Comment to Original 1977 Rule

The last sentence of (c) changes the Arizona Supreme Court's holding in J. & B. Motors, Inc. v. Margolis, 75 Ariz. 392, 257 P.2d 588 (1953).

Cases

611.010 An argumentative question is a question that seeks no factual testimony, but requires instead that the witness acquiesce in inferences drawn by counsel from prior testimony.

State v. Bolton, 182 Ariz. 290, 307–08, 896 P.2d 830, 847–48 (1995) (prosecutor asked defendant following questions: "And you expect the jury to believe this story?"; "[W]e don't have any information with which to charge you with murder, do we?"; "But you thought you would take a gun and a shovel out into the desert to kill somebody about whom you knew virtually nothing?"; court stated these may have been argumentative questions, but not so egregious that it permeated entire trial and probably affected outcome).

Gosewisch v. American Honda Motor Co., 153 Ariz. 389, 399, 737 P.2d 365, 375 (1985) (plaintiff asked defendant's representative following questions: "Do you know how many people have been crippled or killed with a forward flip of these vehicles between 1970 and 1980?" and "Have you or Honda made any effort to find out how many people are being injured in the field with your invention?"; court stated thrust and implication of both questions was that defendant loosed upon public vehicle that was maiming and killing people, and to that extent, questions were argumentative, thus trial court did not err in sustaining objection to those questions).

611.020 A compound question is a question that contains two or more questions, and is not permissible because it is likely to invite an ambiguous answer.

State v. Moody, 208 Ariz. 424, 94 P.3d 1119, ¶¶ 108–10 (2004) (defendant's attorney asked state's expert whether defendant had been "called a malingerer, which is a medical term for liar," to which expert responded, "Yes"; because this was compound question, it was unclear whether expert's response was, "Yes, defendant had been called a malingerer" or "Yes, malingerer is a medical term for liar"; defendant thus was not entitled to relief on claim that expert erred in equating "malingerer" with "liar").

State v. Fodor, 179 Ariz. 442, 453, 880 P.2d 662, 673 (Ct. App. 1994) (at grand jury, defendant answered "no" to following question: "Has anybody ever suggested that you give that type of evidence [letters or documents that you or anyone else wrote to Jim Robison] to [attorney] so that the state could not get it?"; because defendant had given this type of evidence to attorney, state charged defendant with perjury; court held this was compound question, and although answer of "no" to first part was untrue, answer of "no" to second part was true, thus answer could not support conviction for perjury).

611.030 A leading question is one that suggests an answer, not one whose answer is obvious.

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, "Did you see at any time Mike Hedlund's rifle?" was not leading question).

State v. McKinney, 185 Ariz.567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, "[D]id [defendant] appear to be slightly more aggressive towards you or Chris?" was not leading).

State v. Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that "[T]he cat was black, wasn't it?" was leading question; court held that "Had you known that the trust was not insured would you have invested?" was not leading question).

611.035 Once a party has obtained certain information from one witness by use of open-ended questions, it is not error to ask other witness leading questions that elicit the same information.

State v. Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (Ct. App. 1984) (after witness testified that he thought iron bar could hurt him, no error in asking another witness, "[D]id you believe [the bar] to be readily capable of causing either your death or the other officers' death?" and "Did you also believe . . . it could readily cause serious physical injury?").

611.040 Only the party asking a question has the right to object on the grounds the answer is not responsive to the question.

Moschetti v. City of Tucson, 9 Ariz. App. 108, 113, 449 P.2d 945, 950 (1969) (testimony about source of funds to pay condemnation award was irrelevant, but this came in non-responsive answer to appellant's question, and only appellant had right to object on that basis; once this evidence was before jurors, appellee had right to introduce evidence to rebut it).

Paragraph (a) — Control by the court.

611.a.010 The use of the term "shall" in Rule 611(a) means that the trial court should not be merely a passive observer in the trial process, but instead has an affirmative duty to conduct the trial in such a way as to carry out the goals of the Rules of Evidence.

State v. Bible, 175 Ariz. 549, 595, 858 P.2d 1152, 1198 (1993) (court noted trial judges are not merely "referees at prize fights," but are instead "functionaries of justice," and thus have authority to prevent repetitive, irrelevant, or argumentative questioning, even when other party does not object).

Pool v. Superior Ct., 139 Ariz. 98, 103–04, 677 P.2d 261, 266–67 (1984) (court held trial court properly controlled "verbal guerrilla warfare" exhibited by attorneys).

611.a.020 A trial court has discretion to determine the manner of the proceedings, the manner of questioning, and the order of presentation of evidence.

Gamboa v. Metzler, 223 Ariz. 399, 224 P.3d 215, ¶¶ 12–18 (Ct. App. 2010) (because of scheduling problems, parties agreed witness E would testify from 1:00 p.m. to 1:30 p.m., and then parties would have from 1:30 p.m. to 4:30 p.m. for witness A; Plaintiff however did not finish with witness E until 2:41 p.m.; Defendant examined witness A from 3:04 p.m. to 4:00 p.m., and Plaintiff began cross-examination at 4:12 p.m., with a recess from 4:29 p.m. to 4:38 p.m., and continued until 5:04 p.m. when trial court stopped proceedings; Plaintiff objected to trial court's "limiting [his] cross-examination," but did not request to resume cross-examination next day; next morning, trial court considered Plaintiff's objection, and found Plaintiff's attorney was responsible for scheduling problems; trial court did allow Plaintiff's attorney to attempt to contact witness A, but Plaintiff's attorney could not reach witness A; trial court concluded it would not keep jurors waiting any longer and allowed them to begin their deliberations; Plaintiff contended trial court violated his due process rights by not allowing sufficient time to cross-examine witness A; court concluded time limits imposed were not unreasonable, noted Plaintiff had approximately 43 minutes to cross-examine witness A, and further noted Plaintiff did not make offer of proof of what he would have been able to accom-

plish with more cross-examination, and thus held Plaintiff failed to show how he was harmed by trial court's time limitations).

State v. Wassenaar, 215 Ariz. 565, 161 P.3d 608, ¶¶ 26–33 (Ct. App. 2007) (defendant contended that requiring him to testify by responding to questions asked by advisory counsel, rather than by narrative testimony or by asking himself questions, made it appear he was not in control of his own defense and that advisory counsel was actually representing him; court held trial court has broad discretion in management of manner in which trial will be conducted, and this procedure did not violate defendant's right of self-representation).

611.a.090 The trial court may prohibit questions and may enter such orders as are necessary to protect a witness from harassment or undue embarrassment.

State v. Oliver, 158 Ariz. 22, 26–29, 760 P.2d 1071, 1075–78 (1988) (because child molestation victim may be even more adversely affected by unwarranted and unreasonable inquiry into largely collateral and irrelevant evidence than adult victim, trial court should try to protect victim from unwarranted and unreasonably intrusive cross-examination by requiring counsel to demonstrate independent knowledge of sexual matters, without producing details of victim's previous sexual experience).

611.a.095 Before a party may introduce evidence about the witness's mental condition in an attempt to impeach the witness's ability to perceive, remember, or relate, the party must make an offer of proof of evidence sufficient for the jurors to find that the witness's mental condition did have an effect on the witness's ability to perceive, remember, or relate.

State v. Delahanty, 226 Ariz. 502, 250 P.3d 1131, ¶¶ 13–21 (2011) (defendant contended trial court abused discretion in precluding evidence that witness suffered from Schizophrenia; although past records noted witness had been diagnosed with Schizophrenia, defendant's expert was unable to make diagnosis of Schizophrenia, thus trial court did not abuse discretion inprecluding this evidence).

State v. Soto-Fong, 187 Ariz. 186, 197–98, 928 P.2d 610, 621–22 (1996) (because defendant's offer of proof failed to show how officer's terminal illness, use of prescription medicine, or mood in any way affected his testimony, trial court properly precluded this evidence).

State v. Dumaine, 162 Ariz. 392, 397–98, 406, 783 P.2d 1184, 1189–90, 1198 (1989) (defendant presented insufficient evidence to show mental condition affected witness's ability to perceive, remember, and relate, thus prosecutor did not commit discovery violation by failing to disclose witness's mental condition).

State v. Walton, 159 Ariz. 571, 581–82, 769 P.2d 1017, 1027–28 (1989) (state's witness testified about admission defendant had made; defendant sought to introduce evidence of witness's history of drug use, but made no offer of proof beyond bare speculation; state sought to exclude evidence of witness's drug use beyond time he heard defendant's admission; court stated trial court does not abuse discretion when proponent fails to make offer of proof that witness's perception or memory was affected by condition; court held that, because defendant's offer of proof failed to show drug use did impair witness's memory or perception, trial court did not abuse discretion in granting state's motion).

State v. Zuck, 134 Ariz. 509, 513, 658 P.2d 162, 662 (1982) (evidence of insanity admissible if it affected witness's ability to perceive at time of event, relate at time of testimony, or remember in meantime; court stated, "We hold that before psychiatric history of a witness may be admitted to discredit him on cross-examination, the proponent of the evidence must make an offer of proof showing how it affects the witness's ability to observe and relate the matters to which he testifies.").

Mulhern v. City of Scottsdale, 165 Ariz. 395, 397–98, 799 P.2d 15, 17–18 (Ct. App. 1990) (trial court granted defendant's motion to preclude evidence of officer's drug and alcohol use; because plaintiff did not offer any evidence officer was under influence of alcohol or drugs at time of shooting, trial court properly precluded evidence of officer's alcohol and drug use).

611.a.140 The trial court has discretion to allow a party to recall a witness.

State v. Hill, 174 Ariz. 313, 324, 848 P.2d 1375, 1386 (1993) (after trial court dismissed witness, trial court did not abuse discretion in allowing state to recall witness to identify photograph and physical object before offering them in evidence).

State v. Johnson, 183 Ariz. 623, 635, 905 P.2d 1002, 1014 (Ct. App. 1995) (during deliberations, jurors sent note to trial court asking how photographs in photographic lineup were mounted and whether defendant had limp at time of attack; over defendant's objection, trial court recalled detective as "court's witness," told jurors it was doing so because detective was only one who could answer jurors' question, asked detective only questions jurors had asked, and gave both attorneys opportunity to cross-examine detective, which defendant declined; court held this was not an abuse of trial court's discretion and that procedure did not prejudice defendant), *approv'd on other grounds,* 186 Ariz. 329, 922 P.2d 294 (1996).

611.a.150 The trial court has broad discretion to allow, or refuse to allow, a party to reopen its case.

State v. Dickens, 187 Ariz. 1, 12–13, 926 P.2d 468, 479–80 (1996) (once state had rested, one of its witnesses who previously had refused to testify now agreed to testify; trial court did not abuse discretion in allowing state to reopen when testimony did not come as surprise to defendant or prejudice his ability to respond to that evidence).

State v. Patterson, 203 Ariz. 513, 56 P.3d 1097, ¶¶ 5–12 (Ct. App. 2002) (defendant was charged with murder and drive-by shooting; course of car, location of victims, and location of witness all were relevant; jurors had received as exhibits two aerial photographs, computer generated graphics, and hand drawings of area; during deliberations, jurors asked for map of area; defendant objected, but trial court found no prejudice to defendant, and so admitted map; court held that, even though jurors did not say they were deadlocked, trial court did not abuse discretion in reopening case and admitting map for jurors, even though they had begun their deliberations).

State v. Doody, 187 Ariz. 363, 378, 930 P.2d 440, 455 (Ct. App. 1996) (because proposed evidence may have been inadmissible as hearsay and had little probative value, trial court did not abuse its discretion in denying defendant's motion to reopen).

State v. Portis, 187 Ariz. 336, 338, 929 P.2d 687, 689 (Ct. App. 1996) (in probation revocation proceeding, after state failed to present evidence showing that urine sample came from defendant, trial court did not abuse discretion in allowing state to reopen its case to establish this).

Paragraph (b) — Scope of cross-examination.

611.b.010 The trial court has considerable discretion in controlling the scope of cross-examination and in determining the relevance and admissibility of the evidence sought; in order to find error in the trial court's restriction of cross-examination, the appellate court must find that the trial court abused that discretion.

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about his current drug usage, extent and effect of witness's drug usage on night of murder, and witness's potential motive to commit offenses in order to obtain drugs; court held trial court's ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant's rights).

State v. Dickens, 187 Ariz. 1, 13–14, 926 P.2d 468, 480–81 (1996) (defendant wanted to introduce evidence of co-defendant's character for impulsivity; trial court did not err in ruling that, if defendant introduced such evidence, state would be allowed to introduce evidence of homosexual relationship between defendant and co-defendant to show extent of control defendant had over co-defendant).

Brethauer v. General Motors Corp., 221 Ariz. 192, 211 P.3d 1176, ¶¶ 13–14 (Ct. App. 2009) (at pre-trial deposition, emergency medical technician (Davis) who had treated plaintiff at accident scene stated he did not remember what plaintiff said, but checked box in report that said "not wearing seat belt," and that he would not have checked that box unless he had good information; trial court granted plaintiff's motion to preclude introduction of Davis's report or his testimony about plaintiff's seat belt usage; during cross-examination of plaintiff, defendant's attorney asked, "Now, after the accident, didn't you tell the paramedics at the scene that you were not wearing your seat belt?"; court held trial court properly denied plaintiff's motion for mistrial because trial court's order only precluded asking Davis about seat belt usage, it did not preclude asking plaintiff what he said to Davis).

611.b.020 Arizona allows a broad scope of cross-examination, the unreasonable limitation of which will normally result in a reversal.

Downs v. Scheffler, 206 Ariz. 496, 80 P.3d 775, ¶¶ 20–29 (Ct. App. 2003) (child was born in 1991; mother was awarded sole custody with father receiving parenting time and grandmother receiving visitation; mother and child lived with grandmother, and in 1992, mother moved out and stopped seeing child until 1999; in 2000, both parents consented to appointment of grandmother as child's guardian; in 2001, grandmother petitioned court to grant her legal custody of child; Conciliation Services evaluator prepared report concluding it was in child's best interest for mother to retain sole legal custody, and testified she had formed her opinion on information not contained in report and that she would not reveal in grandmother's presence; although trial court admitted report in evidence, it would not allow grandmother to cross-examine evaluator because grandmother had not yet established that mother was not fit parent; court held issue was best interests of child, and that trial court erred in not allowing cross-examination of evaluator).

Arizona Indep. Redrist. Comm'n v. Fields, 206 Ariz. 130, 75 P.3d 1088, ¶¶ 42–50 (Ct. App. 2003) (Arizona Independent Redistricting Commission hired National Demographics Corporation as lead consultant in redistricting process and then named NDC personnel as testifying experts; court held that, because (1) Arizona allows full cross-examination of expert witnesses, (2) rules

of civil procedure allow full discovery of expert witnesses, and (3) it is beneficial to have a bright-line for discovery for expert witnesses who are both consulting experts and testifying experts, if party designates consulting expert as testifying expert, party will waive any work-product privilege for communications with that expert, thus IRC waived any legislative privilege for communication with those experts, any materials reviewed by them, and subject of expert's testimony).

611.b.025 The trial court has the discretion to preclude cross-examination about a document that has not been admitted in evidence.

State v. Ellison, 213 Ariz. 116, 140 P.3d 899, ¶¶ 52–53 (2006) (in February 1999, victims were killed; victims' daughter testified she saw defendant working at her parents' house in July or August 1998; defendant sought to impeach her with defendant's Arizona Department of Corrections records that showed he was in prison from May 1998 through January 1999; court noted that AzDOC records had not been admitted in evidence, and held that trial court did not abuse discretion in ruling that defendant could not use records during witness's cross-examination absent their admission in evidence).

611.b.030 The constitutional right of the defendant to cross-examine witnesses does not give the defendant the right to cross-examine on irrelevant matters.

State v. Carreon, 210 Ariz. 54, 107 P.3d 900, ¶¶ 35–37 (2005) (because defendant failed to show how two other murders were related to charges against defendant, precluding cross-examination about these murders did not violate defendant's Sixth Amendment rights).

State v. Cañez, 202 Ariz. 133, 42 P.3d 564, ¶¶ 62–64 (2002) (trial court allowed defendant to cross-examine witness about his current drug usage, extent and effect of witness's drug usage on night of murder, and witness's potential motive to commit offenses in order to obtain drugs; court held trial court's ruling precluding defendant from cross-examining witness about remote drug usage did not violate defendant's rights).

State v. Hoskins, 199 Ariz. 127, 14 P.3d 977, ¶¶ 59–64 (2001) (defendant asserted that he told his sister that an unknown person named "Paul" gave him gun used in murder and that sister told witness about this, and contended he should have been allowed to cross-examine witness about these conversations; court held that these were self-serving hearsay statements and too vague to establish third-party culpability, thus trial court properly precluded them).

State v. Riggs, 189 Ariz. 327, 334, 942 P.2d 1159, 1166 (1997) (defendant asked victim if he refused to be interviewed, state objected, and trial court sustained objection; court held defendant failed to show reason victim's refusal to be interviewed had any relevance).

611.b.035 The confrontation clause guarantees only an opportunity for effective cross-examination, not cross-examination that is effective in whatever way, and to whatever extent, the defendant might wish.

State v. King, 180 Ariz. 268, 275–76, 883 P.2d 1024, 1031–32 (1994) (because witness testified, defendant received right of confrontation, and it did not matter that witness did not answer numerous questions because of lack of memory, which trial court concluded was feigned).

State v. Salazar, 216 Ariz. 316, 166 P.3d 107, ¶¶ 9–10 (Ct. App. 2007) (when victim testified she did not remember or could not recall, prosecutor played her tape recorded statement; because victim was present and subject to cross-examination; admission of her out-of-court statement

did not violate confrontation clause; court held confrontation clause does not guarantee witness will not give testimony marred by forgetfulness, confusion, or evasion).

State v. Real, 214 Ariz. 232, 150 P.3d 805, ¶¶ 2–9 (Ct. App. 2007) (officer administered FSTs to defendant and then took his statement; at trial, officer had no independent memory of investigation, so trial court allowed officer to read from his report; court held that, because officer testified and was subject to cross-examination, admission officer's testimony did not violate Sixth Amendment).

611.b.040 If the trial court improperly restricts the defendant's cross-examination of a witness, it will violate the defendant's constitutional right of cross-examination.

State v. Dunlap, 187 Ariz. 441, 455–56, 930 P.2d 518, 532–33 (Ct. App. 1996) (because portions of letter could have shown witness's bias and desire to alter testimony, trial court erred in limiting cross-examination, but error was harmless).

611.b.090 There is no right, nor should a trial court permit, the use of recross-examination to repeat or re-emphasize matters already covered on cross-examination.

State v. Rienhardt, 190 Ariz. 579, 587, 951 P.2d 454, 462 (1997) (on cross-examination, defendant elicited inconsistent statement from state's key witness; on re-direct, trial court allowed state to introduce prior consistent statements; defendant claimed this precluded him from cross-examining witness about inconsistencies; court held that defendant had already brought out inconsistencies in cross-examination).

Paragraph (c) — Leading questions.

611.c.010 A leading question is one that suggests an answer, not one whose answer is obvious.

State v. McKinney, 185 Ariz. 567, 575, 917 P.2d 1214, 1222 (1996) (after prosecutor received negative response to question whether witness had seen anything in trunk of car, asking, "Did you see at any time Mike Hedlund's rifle?" was not leading question).

State v. McKinney, 185 Ariz.567, 575, 917 P.2d 1214, 1222 (1996) (asking witness, "[D]id [defendant] appear to be slightly more aggressive towards you or Chris?" was not leading).

State v. Agnew, 132 Ariz. 567, 577, 647 P.2d 1165, 1175 (Ct. App. 1982) (court stated that "[T]he cat was black, wasn't it?" was leading question; court held that "Had you known that the trust was not insured would you have invested?" was not leading question).

611.c.020 The trial court has discretion to allow leading questions on direct examination when necessary to develop testimony.

State v. Duffy, 124 Ariz. 267, 273–74, 603 P.2d 538, 544–45 (Ct. App. 1979) (trial court did not abuse discretion in allowing leading questions on direct examination in complex land fraud case, where defendant's actions took place over period of 7 years, trial lasted over 1 month, and resulted in 14 volumes of transcripts).

611.c.030 The use of leading questions is not reversible error when the evidence covered by the leading questions is already before the jurors.

State v. Garcia, 141 Ariz. 97, 101, 685 P.2d 734, 738 (1984) (because one witness had already testified he felt in danger because of defendant's actions, asking second witness to confirm fact that he felt threatened was not error).

611.c.040 Failure to object to the use of leading questions precludes review on appeal.

State v. Cardenas, 146 Ariz. 193, 196–97, 704 P.2d 834, 837–38 (Ct. App. 1985) (counsel moved in limine to preclude leading questions; trial court reserved ruling and counsel never objected at trial).

611.c.050 When a party asks non-leading, open-ended questions on cross-examination, the party runs the risk of obtaining unfavorable answers.

State v. Stuard, 176 Ariz. 589, 600–01, 863 P.2d 881, 892–93 (1993) (because defendant's attorney was aware officer knew defendant had been in prison, but nonetheless asked broad question that called for response that defendant had been in prison, rather than asking narrow, leading question, any error was invited by attorney's question).

State v. Lundstrom, 161 Ariz. 141, 150, 776 P.2d 1067, 1076 (1989) (by asking non-leading, open-ended questions on cross-examination, state invited defendant's expert witness to repeat fact that opinion of non-testifying expert was same as witness's opinion).

611.c.060 When the other party's expert witness gives an opinion, discloses that the opinion is based on the opinion of a non-testifying expert, and discloses what that other opinion was, the party may call the non-testifying expert as a witness and examine that expert by cross-examination, which would include using leading questions.

State v. Lundstrom, 161 Ariz. 141, 147, 776 P.2d 1067, 1073 (1989) (defendant's expert witness had relied at least to some extent on opinion of non-testifying expert; state made no request to call non-testifying expert as witness).